

JUN 26 1998

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 95-01540

COUNSEL:

HEARING DESIRED: Yes

APPLICANT REQUESTS THAT:

His under other than honorable conditions (UOTHC) discharge be upgraded to honorable.

APPLICANT CONTENDS THAT:

The administrative discharge board proceeding violated his rights to due process because they were conducted in a fundamentally unfair manner. The government did not establish by a preponderance of the evidence that the urine that was tested contained more than 15 nanograms per milliliter (ng/ml) of marijuana metabolites. The sample that was tested did not have his social security number assigned to it and he contends that the sample was not his. He feels that the character of his discharge was unduly harsh and failed to consider his entire military record.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

On 4 Aug 70, the applicant enlisted in the [REDACTED] Air National Guard (ANG) Reserve for a period of six years in the grade of airman basic. He continuously reenlisted. His last reenlistment was on 1 Feb 88 for a period of six years in the grade of staff sergeant.

There are no Airman Performance Reports (APRs) in applicant's records. The Chief, Master Records Management Division, indicated that all efforts to locate the APRs or microfiche have been exhausted.

The applicant's record indicates that in Apr 89, he provided a urine sample as part of a random urinalysis. His urine sample was placed in a bottle that did not accurately reflect his social security number (one digit was recorded incorrectly) and the

sample was mailed for testing. The sample was tested by the Air Force Testing Laboratory #1, ██████████, where it was found to contain the metabolite THC found in marijuana. Specifically, the sample contained THC in a quantity of 32.6 ng/ml which exceeds the Department of Defense (DOD) cutoff level of 15 ng/ml.

On 21 Dec 89, at the applicant's request, the sample was retested by Eastern Laboratories, an independent laboratory. Eastern Laboratory found 13.4 ng/ml of THC. AFPC/JA states that THC in marijuana has a half-life in urine samples. It breaks down resulting in lower readings as time progresses; thus, the finding of less than the DOD cutoff level in December does not indicate an absence of THC at above the DOD cutoff level in April.

On 3-4 Mar 90, an administrative discharge board was held to determine whether the applicant used marijuana in contravention of ANGR 39-10, paragraph 8-17, and, if so, whether and in what manner he should be discharged. The board found that on or about 8 Apr 89, the applicant used marijuana. In addition, the board found that he was subject to discharge due to drug abuse and the board recommended that he be discharged because of misconduct with an under other than honorable conditions discharge.

On 16 Sep 91, the Assistant Adjutant General concurred with the findings of the administrative discharge board that the applicant used illegal drugs, to wit: marijuana, and accordingly, should be discharged with an under other than honorable conditions discharge.

On 19 Mar 92, the applicant was discharged from the New York ANG pursuant to ANGR 39-10 (Under Other Than Honorable) for use of marijuana (drug abuse) in the grade of staff sergeant. He was credited with 13 years, 2 months, and 6 days of service for pay.

AIR FORCE EVALUATION:

The Chief, Readiness & Special Actions Office, ANG/MPPU, reviewed this application and indicated that, although ANGR 39-10 provides for honorable characterization even for misconduct, violation of the trust bestowed to a noncommissioned officer (NCO) is a serious offense and an honorable characterization does not accurately reflect that violation of trust. Evidence in this case does not require an honorable discharge be provided, especially when weighted against ANGR 39-10, Chapter 1, Section C. The applicant's contentions have not been substantiated. The urine sample was properly admitted, despite the one digit error in the social security number and the specimen showed a chain of custody, a lab accession number and applicant's initials on the label. Therefore, the specimen was properly admitted as evidence.

In reviewing the applicant's case file, MPPU noted several items of concern. The Legal Advisor rejected an instruction proposed by the applicant's counsel that the board could recommend an honorable or general discharge based on its consideration of the applicant's service record. It was arguably an error not to have informed the board that it could recommend a different type of discharge based on the applicant's service record. The question is whether the error was reversible. MPPU recommends denial of the applicant's request because the board members had several sources from which they should have known that a characterization better than a UOTHC discharge could be recommended. Therefore, they do not feel that the Legal Advisor's refusal to instruct the board on the discharge characterization options constitute reversible error,

A complete copy of the Air Force evaluation is attached at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the Air Force evaluation and indicated that he disagrees with their findings. He states that, by their own admission, they noted several items of concern, notably the question as to whether the error regarding the Legal Advisor rejecting an instruction proposed by his counsel that the board could recommend an honorable or general discharge based on its consideration of his service record and whether the error was reversible. He states that the error is reversible which is the reason for his appeal. In today's world, any errors having to do with a social security number and a urine specimen are grounds to have the sample disregarded.

Applicant's complete response is attached at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

The Senior Attorney-Advisor, AFPC/JA, also reviewed this application and indicated that the applicant's entire military record was available and was considered by the board. They are focusing on the one allegation which they believe clearly constitutes an error. The legal advisor was requested to give an appropriate instruction informing the members that honorable and general (under honorable conditions) characterizations were options that the board could recommend. The available evidence establishes the following:

(1) the legal advisor declined to give the requested instruction,

(2) the requested instruction was consistent with the regulation (ANGR 39-10, paragraph 1-6),

(3) the information in the requested instruction was available to the board members through other sources, and,

(4) the defense counsel had the opportunity to argue that honorable and general discharges were available,

In JA's opinion, it was clear error for the legal advisor not to advise the board members that discharges under honorable or general conditions were authorized. While there were several sources from which the board should have known this information, the source which normally will have the greatest influence on the board members-and upon which they understandably rely-is the legal advisor. Under these circumstances, therefore, JA is unable to say that the error did not affect the character of applicant's discharge. However, at the same time, they are equally unwilling to concede that the characterization of under other than honorable conditions was unwarranted. Normally, the most appropriate discharge in a misconduct case is under other than honorable conditions. However, if after examination of all the evidence and applicant's complete military record, the Board concludes applicant's prior honorable service outweighs his misconduct, an upgrade would be appropriate. In JA's view, the applicant's service was not sufficient to overcome his misconduct to a degree that would support an honorable characterization. They recommend the case be referred to ANGB/JA for comment and upon receipt of an advisory from that agency, recommend the Board weigh applicant's good service against the conduct for which he was discharged to determine appropriate service characterization. In any event, they recommend that the Board not upgrade applicant's service characterization to honorable.

A complete copy of the additional Air Force evaluation is attached at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

The applicant reviewed the additional Air Force evaluation and indicated that he had some 14 years of honorable service with both the Air Guard and Coast Guard Reserve with the citations and service pins to justify it at the time of this incident. All his supervisors and his commander came forward to attest to his honorable service record. In essence, AFPC/JA did not address the fact that he was not given a fair trial; there was no proof or evidence that he was deserving of an other than honorable discharge; and, errors committed deprived him of a fair trial.

Applicant's complete response is attached at Exhibit H.

ADDITIONAL AIR FORCE EVALUATION:

The Chief Counsel, National Guard Bureau, NGB-JA, reviewed this application and indicated that, in reference to the conflict noted between the advisories of AFPC/JA and ANG/MPPU, NGB-JA suspects this is in reference to the firm stance of ANG/MPPU that the UOTHC should be confirmed, notwithstanding the legal advisor's error. NGB-JA concurs with the view of AFPC/JA that the error should cause the Board to review the applicant's service record and weigh it, pursuant to Chapter 1, Section C, paragraphs 1-6, against his misconduct to determine whether any relief should be granted. NGB-JA reaffirms their belief that the legal advisor committed error in refusing to instruct the board on the possibility that it could vote for a characterization better than UOTHC and also reaffirm their opinion that the evidence in this case does not warrant an upgrade in service characterization. In an action before the Board, the burden is on the applicant to provide evidence to support a finding of the existence of a probable material error or injustice. NGB-JA believes the evidence of record has not carried this burden on the issue of characterization. The Board can decide whether applicant's service characterization should be sustained as a UOTHC discharge, upgraded to general, under honorable conditions, or upgraded to honorable.

A complete copy of the Air Force evaluation, with an attached legal opinion from the Administrative Law Branch, NGB-JA, is attached at Exhibit I.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

A copy of the additional Air Force evaluation was forwarded to applicant and counsel on 21 Jan 98. However, as of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough review of the evidence of record and applicant's submission, we are not persuaded that his UOTHC discharge should be upgraded to honorable. His contentions are duly noted; however, an administrative discharge board determined that the applicant used marijuana and his discharge was based on a

positive urinalysis for marijuana. While the applicant believes his rights to due process were violated (i.e., the legal advisor rejected an instruction proposed by his counsel that the administrative board could recommend an honorable or general discharge based on its consideration of his service record; that there was a discrepancy due to a one digit error in the social security number; and that the government did not establish by the preponderance of the evidence that the urine tested contained more than 15 ng/nl of marijuana metabolites), we disagree. In this respect, it appears that the specimen showed a chain of custody, a lab accession number and applicant's initials on the label despite the one digit error in the social security number. While the legal advisor failed to advise the board members that discharges under general or honorable were authorized, we believe that the applicant's defense counsel had the opportunity to argue that a characterization more appropriate than a UOTHC could be recommended. In addition, the sample contained a quantity of 32.6 ng/nl which exceeded the DOD cutoff level of 15 ng/ml. In view of the foregoing, the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

4. Although the applicant has provided some statements at the time he was in the service indicating he was an excellent worker, he was dedicated to his responsibilities and his work quality was exemplary, the Board finds these statements insufficient to warrant an upgrade of his discharge on the basis of clemency. The applicant's records lack information concerning service, i.e., APRs, awards, etc. If he can substantiate his quality of service and show that a major portion of his enlistment was honorably fulfilled, the Board would be willing to reevaluate his application. We cannot, however, recommend approval based on the current evidence of record.

5. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without counsel, would not have materially added to that understanding. Therefore, the request for a hearing is not favorably considered.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 2 June 1998, under the provisions of Air Force Instruction 36-2603:

Mr. LeRoy T. Baseman, Panel Chair
Mr. Joseph G. Diamond, Member
Ms. Peggy E. Gordon, Member
Mrs. Joyce Earley, Examiner (without vote)

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 30 Jun 95, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, ANG/MPPU, dated 7 Mar 97.
- Exhibit D. Letter, AFBCMR, dated 7 Apr 97.
- Exhibit E. Letter fr applicant, dated 15 Apr 97.
- Exhibit F. Letter, AFPC/JA, dated 5 Sep 97.
- Exhibit G. Letter, AFBCMR, dated 15 Sep 97.
- Exhibit H. Letter fr applicant, dated 2 Oct 97.
- Exhibit I. Letter, NGB-JA, dated 12 Dec 97, w/atch.
- Exhibit J. Letter, AFBCMR, dated 21 Jan 98,



LeROY T. BASEMAN
Panel Chair